

A **TAHAN STEEL CORPORATION SDN BHD**

v.

BANK ISLAM MALAYSIA BHD

B COURT OF APPEAL, PUTRAJAYA
ABU SAMAH NORDIN JCA
HISHAMUDIN MOHD YUNUS JCA
AZIAH ALI JCA
C [CIVIL APPEAL NO: W-02(IM)-1734-2010]
20 DECEMBER 2011

D **BANKING:** *Banks and banking business - Islamic banking - Repudiatory breach of Al-Istisnaa' facility agreements by bank - Failure of borrower to prove damages arising from breach - Whether only nominal damages to be awarded - Whether security documents formed part of the Al-Istisnaa' facility agreements - Whether termination of the Al-Istisnaa' facility agreements rendered the security documents being discharged or cancelled - Whether bank's repudiatory breach absolved borrower from liability to repay the loan facility*

E **CONTRACT:** *Breach - Damages - Nominal damages - Repudiatory breach of Al-Istisnaa' facility agreements by bank - Failure of borrower to prove damages arising from breach - Whether only nominal damages to be awarded*

F **CONTRACT:** *Breach - Fundamental breach - Islamic banking - Repudiatory breach of Al-Istisnaa' facility agreements by bank - Failure of borrower to prove damages arising from breach - Whether only nominal damages to be awarded - Whether security documents formed part of the Al-Istisnaa' facility agreements - Whether termination of the Al-Istisnaa' facility agreements rendered the security documents being discharged or cancelled - Whether bank's repudiatory breach absolved borrower from liability to repay the loan facility*

H **EVIDENCE:** *Witness - Credibility - Assessment of credibility and demeanor of witness - Whether appellate interference required - Whether findings are clearly wrong or erroneous - Whether trial Judge had not considered relevant matters or had taken into account irrelevant matters*

I **ISLAMIC LAW:** *Islamic banking - Al-Istisnaa' facility agreements - Repudiatory breach of Al-Istisnaa' facility agreements by bank - Failure of borrower to prove damages arising from breach - Whether only nominal damages to be awarded - Whether security documents formed part of the Al-Istisnaa' facility agreements - Whether termination of the Al-Istisnaa'*

facility agreements rendered the security documents being discharged or cancelled - Whether bank's repudiatory breach absolved borrower from liability to repay the loan facility A

The appellant had undertaken a development project ('the project') which was to be carried out on a piece of land ('the said Land'). The respondent agreed to provide an Islamic financing facility of RM97,000,000 to part finance the project under an Al Istisnaa' Purchase Agreement ('APA') and Al-Istisnaa' Sale Agreement ('ASA'). Pursuant to the terms of the APA, the respondent disbursed the entire facility amount of RM97,000,000 into a Financial Project Account ('FPA'). From the FPA, the respondent had allowed drawdown on the facility in two tranches amounting to a total sum of RM58,715,984.84. The appellant claimed that the respondent had wrongly refused drawdown of the third tranche and that this amounted to a repudiation of the APA. The appellant accordingly accepted the repudiation and sought damages against the respondent for the alleged breach. The respondent alleged breach on the part of the appellant in failing to meet a condition precedent, namely, the requirement that the appellant must secure funding from a foreign Exim bank. The respondent counterclaimed for the outstanding amount due under the APA based on the amount disbursed. The High Court declared that the appellant's termination of the APA Agreements was valid and lawful and allowed nominal damages of RM50,000 on the ground that the appellant had failed to prove the damages and losses. The learned judge allowed the respondent's counterclaim for the balance of the sale price in the sum of RM143,590,488.09 less the profits on the undisbursed amount of RM38,248,064.46 and less the profits (if any) that were unearned at the date of full payment. The appellant appealed against the quantum of general damages, the dismissal of the rest of its claims and against the award of counterclaim granted in favour of the respondent. The respondent cross appealed against the order of the learned judge allowing a sum of RM38,248,064.46 and the unearned profits (if any) at the date of full payment to be deducted from the balance of sale price of RM143,590,488.09. By reason of the termination, the appellant also sought a declaration that the respondent was not entitled to rely on or enforce the Security Documents given in relation to the financing facility.

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A Held (allowing the appellant's appeal in part and dismissing the respondent's cross-appeal and each party to bear own costs)

Per Aziah Ali JCA (Abu Samah Nordin JCA concurring) (majority):

- B** (1) In respect of claims for damages, the burden was on the appellant to prove the damages claimed. The learned trial judge found no evidence to suggest that failure of the appellant's project could be contributed by the respondent's failure to allow drawdown of the third tranche. The learned judge found discrepancies in the appellant's documents, the certification of claims by the appellant's consultant was not tendered and the evidence of the appellant's witnesses wanting and highly inconsistent and did not appear to be credible.
- C** These findings were arrived at based on the learned judge's appreciation of the evidence and her assessment of the credibility and demeanor of the witnesses. A trial judge is a trier of facts and an award of damages made based on findings of facts from evidence adduced at the trial ought not to be disturbed unless it is shown that the findings are clearly wrong or erroneous or that the trial judge had not considered relevant matters or had taken into account irrelevant matters.
- D** The appellant had not shown that the trial judge's findings on the issue of proof of damage were clearly wrong or erroneous or that the trial judge had erred in law and principle; (*Guan Soon Tin Mining Company v. Wong Fook Kum*; refd); (*Tanjung Tiara Sdn Bhd v. Paragro Sdn Bhd*; refd). (paras 93 & 94)
- E**
- F**
- G** (2) Insofar as Islamic financing transaction is concerned which is similar to Bai Bithaman Ajil contract ('BBA contract'), the Property Purchase Agreement and the Property Sale Agreement complete the transaction. However the security documents do not form part of the BBA transaction. It is a separate security arrangement distinct from the Facility Agreement. Since the Security Documents were a security arrangement and not part of the financing transaction, the termination of the APA would not result in the Security Documents being rendered discharged and/or cancelled. Therefore the learned judge had not erred in refusing to grant the prayers sought for in respect of the Security Documents.
- H**
- I** There was no reason why the respondent ought to be restrained from acting upon the Security Documents. (para 96)

- (3) Despite the failure of the respondent to allow drawdown of the third tranche, this did not wholly absolve the appellant from liability to pay. As it was the respondent who repudiated the APA resulting in its termination, the respondent was only entitled to counterclaim and recover the sums which were paid to the appellant by way of the first drawdown and the second drawdown totaling RM58,715,984.84 and the corresponding profits thereon after deducting the amount of repayment (if any). (paras 99-101)

Per Hishamudin Mohd Yunus JCA (partially dissenting)

- (1) The recitals to and terms of the security documents all pointed to the fact that they were all closely related to one another and formed part of the very same documents governing the rights and obligations between the parties pertaining to a single financial facility. As such the APA and the ASA must be treated as one facility agreement, such that a repudiation of the APA by the respondent would automatically result in a repudiation (and breach) of the ASA as well; and the security documents must be treated as one with the APA and the ASA. Hence, the learned trial judge ought not to have refused the reliefs on the security documents as prayed for by the appellant. (*Glamour Green Sdn Bhd v. Ambank Bhd & Ors & Another Appeal*, *Gopal Sri Ram*; refd). (paras 38-39)
- (2) The learned judge was correct in awarding only nominal general damages of RM50,000 because the appellant had failed to furnish clear evidence as to the amount of damages that it suffered. (para 50)
- (3) Having made a declaratory order on the lawfulness and validity of the termination by the appellant of both the APA and the ASA, it was contradictory or inconsistent on the part of the learned trial judge to allow the respondent's counterclaim. A party cannot benefit from its own wrongdoing. Furthermore, once a contract is lawfully terminated the contract comes to an end and parties are absolved from all future obligations. Hence, the appellant's appeal pertaining to the respondent's counterclaim should be allowed. The appellant should return to the respondent the sum of RM58,715,934.84 that had been disbursed to it minus any repayments that it had made to the respondent/defendant. (paras 57-59)

A *Bahasa Malaysia Translation Of Headnotes*

- Perayu telah memulakan satu projek pembangunan ('projek') yang dijalankan atas sebidang tanah ('Tanah tersebut'). Responden bersetuju memberikan kemudahan kewangan Islam sebanyak
- B** RM97,000,000 bagi membiayai sebahagian dari projek di bawah perjanjian-perjanjian Al Istisnaa' Purchase Agreement ('APA') dan Al-Istisnaa' Sale Agreement ('ASA'). Berdasarkan terma-terma APA, responden menyalurkan keseluruhan jumlah kemudahan sebanyak RM97,000,000 ke dalam satu akaun yang dipanggil
- C** Financial Project Account ('FPA'). Dari FPA, responden telah membenarkan pengeluaran melalui dua tranches berjumlah RM58,715,984.84. Perayu mendakwa bahawa responden telah dengan salahnya enggan membenarkan pengeluaran tranche ketiga, yang sekaligus menyebabkan pembatalan APA. Apapun perayu
- D** telah menerima pembatalan dan menuntut ganti rugi terhadap responden atas kemungkiran yang dikatakan itu. Responden mendakwa bahawa perayu telah gagal memenuhi satu syarat duluan, iaitu keperluan bagi perayu mendapatkan pembiayaan dari sebuah bank Exim luar negara. Responden dengan itu menuntut
- E** balas bagi jumlah tertunggak yang perlu dibayar di bawah APA berasaskan kepada jumlah yang sudah dibayar keluar. Mahkamah Tinggi mengisytiharkan bahawa penamatan Perjanjian-Perjanjian APA oleh perayu adalah tidak salah dan sah sekaligus membenarkan ganti rugi nominal RM50,000 disebabkan perayu
- F** gagal membuktikan kerugian atau kehilangannya. Yang arif hakim membenarkan tuntutan balas responden untuk baki harga jualan sebanyak RM143,590,488.09, sebelum ditolak keuntungan dari jumlah RM38,248,064.46 yang belum dibayar keluar dan keuntungan-keuntungan tidak wajar lain (jika ada) pada tarikh
- G** pembayaran penuh. Perayu merayu terhadap kuantum ganti rugi am, terhadap penolakan tuntutan-tuntutannya yang lain dan terhadap award tuntutan balas yang diberikan kepada responden. Responden pula merayu balas terhadap perintah yang arif hakim membenarkan jumlah RM38,248,064.46 dan perintah supaya
- H** keuntungan-keuntungan tidak wajar (jika ada) pada tarikh pembayaran penuh ditolak dari baki harga pembelian RM143,590,488.09. Mengambil kira bahawa telah berlaku penamatan, perayu juga memohon deklarasi bahawa responden tidak boleh bergantung kepada atau melaksanakan Dokumen-
- I** dokumen Jaminan yang diberikan berkaitan dengan kemudahan pembiayaan.

Diputuskan (membenarkan rayuan perayu sebahagiannya; menolak rayuan balas responden; pihak-pihak menanggung kos masing-masing)

Oleh Aziah Ali HMR (Abu Samah Nordin HMR bersetuju) (majoriti):

- (1) Berhubung tuntutan gantirugi, beban adalah atas perayu untuk membuktikan kerugian. Yang arif hakim bicara tidak mendapati sebarang keterangan yang menunjukkan bahawa kegagalan projek perayu sebahagiannya disebabkan oleh kegagalan responden untuk membenarkan pengeluaran tranche ketiga. Yang arif hakim mendapati banyak percanggahan pada dokumen-dokumen perayu, bahawa sijil pengesahan tuntutan oleh konsultan perayu tidak dikemukakan dan bahawa keterangan saksi-saksi perayu adalah cacat, amat tidak konsisten dan tidak boleh dipercayai. Dapatan-dapatan ini dicapai atas penilaian yang arif hakim terhadap keterangan-keterangan serta berdasarkan pemerhatian beliau terhadap kebolehpercayaan saksi-saksi serta tingkahlaku mereka. Seorang hakim bicara adalah seorang pengadil fakta dan suatu award gantirugi yang dibuat berdasarkan dapatan-dapatan fakta tidak seharusnya diganggu kecuali ianya dibuktikan bahawa dapatan-dapatan jelas salah atau khilaf atau bahawa hakim bicara tidak menimbang perkara-perkara relevan atau telah mengambilkira hal-hal yang tidak relevan. Perayu tidak menunjukkan bahawa dapatan hakim bicara atas isu pembuktian kerugian adalah salah atau khilaf atau bahawa hakim bicara telah terkhilaf di sisi undang-undang dan prinsip. (*Guan Soon Tin Mining Company v. Wong Fook Kum* refd); (*Tanjung Tiara Sdn Bhd v. Paragro Sdn Bhd*; dirujuk).
- (2) Setakat yang berkaitan dengan transaksi kewangan Islam, ianya sama seperti kontrak Bai Bithaman Ajil ('kontrak BBA'). Perjanjian Pembelian Hartanah dan Perjanjian Penjualan Hartanah hanya menyempurnakan transaksi. Bagaimanapun, dokumen-dokumen jaminan bukanlah sebahagian dari transaksi BBA. Ia adalah pengurusan jaminan yang terasing dari Perjanjian Kemudahan. Oleh kerana Dokumen Jaminan merupakan suatu pengurusan jaminan dan bukan sebahagian dari transaksi pembiayaan, maka penamatan APA tidak mengakibatkan Dokumen Jaminan menjadi terlepas dan/atau terbatal. Oleh itu, yang arif hakim tidak khilaf apabila tidak

- A membenarkan tuntutan yang dipohon berkaitan Dokumen Jaminan. Tiada alasan mengapa responden perlu ditahan dari bertindak berdasarkan Dokumen Jaminan.
- (3) Walaupun terdapat kegagalan responden untuk membenarkan pengeluaran tranche ketiga, ia tidak boleh melepaskan perayu sepenuhnya dari tanggungan untuk membayar balik. Oleh kerana responden yang membatalkan APA dan menyebabkan penamatannya, maka responden hanya berhak untuk menuntut balas dan mendapat kembali jumlah yang telah dibayar kepada perayu melalui pengeluaran pertama dan kedua sebanyak RM58,715,984.84 serta keuntungan-keuntungan yang berbangkit darinya setelah ditolak jumlah pembayaran balik (jika ada).
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- D Oleh Hishamudin Mohd Yunus HMR (tidak menyetujui sebahagiannya)**
- (1) Resital dan terma dalam dokumen jaminan kesemuanya menunjuk kepada fakta bahawa terma-terma tersebut berkait rapat antara satu sama lain dan menjadi sebahagian dari dokumen-dokumen sama yang mengawalselia hak-hak dan obligasi pihak-pihak berhubung dengan satu kemudahan kewangan tunggal. Oleh itu, APA dan ASA harus dianggap sebagai satu perjanjian kemudahan tunggal, berakibat pembatalan APA oleh responden akan secara automatik membatalkan (dan memungkiri) juga ASA; dan dokumen jaminan harus pula dianggap sebagai terangkum bersekali dengan APA dan ASA. Oleh itu, yang arif hakim bicara tidak sepatutnya tidak membenarkan relif atas dokumen jaminan sepertimana yang dipohon oleh perayu (*Glamour Green Sdn Bhd v. Ambank Bhd & Ors & Another Appeal*, *Gopal Sri Ram*; dirujuk).
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- H (2) Yang arif hakim betul dalam mengawardkan hanya gantirugi am nominal RM50,000 oleh kerana perayu gagal mengemukakan bukti jelas mengenai jumlah kerugian yang dialaminya.
- I (3) Setelah membuat perintah deklaratori berhubung dengan kesahan penamatan APA dan ASA oleh perayu, adalah tidak konsisten dan sesuatu yang bertentangan di pihak hakim bicara untuk seterusnya membenarkan tuntutan balas responden. Suatu pihak tidak boleh mendapat keuntungan dari kesalahannya sendiri. Selain itu, sebaik sesuatu kontrak telah ditamatkan dengan sahnyanya maka kontrak tersebut akan

berakhir dan pihak-pihak dilepaskan dari tanggungan-tanggungan akan datang. Oleh itu rayuan perayu berhubung dengan tuntutan balas responden seharusnya dibenarkan. Perayu harus mengembalikan kepada responden jumlah RM58,715,934.84 yang telah pun dibayar kepada perayu, ditolak sebarang bayaran balik yang telah dibuatnya kepada responden/defendan. A
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Case(s) referred to:

- Abdul Rahim Abdul Hamid & Ors v. Perdana Merchant Bankers Bhd & Ors* [2006] 3 CLJ 1 FC (*refd*) C
- Abdul Razak Datuk Abu Samah v. Shah Alam Properties Sdn Bhd & Another Appeal* [1999] 3 CLJ 231 CA (*refd*)
- Bank Bumiputra Malaysia Bhd Kuala Terengganu v. Mae Perkayuan Sdn Bhd & Anor* [1993] 2 CLJ 495 SC (*refd*)
- Bank Islam Malaysia Bhd v. Lim Kok Hoe & Anor & Other Appeals* [2009] 6 CLJ 22 CA (*refd*) D
- Dato' Hj Nik Mahmud Daud v. Bank Islam Malaysia Bhd* [1998] 3 CLJ 605 CA (*refd*)
- Glamour Green Sdn Bhd v. Ambank Bhd & Ors & Another Appeal* [2007] 3 CLJ 413 CA (*refd*)
- Guan Soon Tin Mining Company v. Wong Fook Kum* [1968] 1 LNS 43 FC (*refd*) E
- Heyman v. Darwins Ltd* [1942] AC 356 (*refd*)
- Inglis & Anor v. Commonwealth Trading Bank of Australia* [1971-1972] CLR 161 (*refd*)
- Johnson & Anor v. Agnew* [1980] AC 367 (*refd*)
- Kesang Leasing Sdn Bhd v. Dato' Haji Mat @ Mat Shah Ahmad & Ors* (No 2) [2009] 1 LNS 74 HC (*refd*) F
- KPM Khidmat Sdn Bhd v. Tey Kim Suie* [1994] 3 CLJ 1 SC (*refd*)
- Manks v. Whiteley* [1912] 1 Ch 735 (*refd*)
- Nirwana Construction Sdn Bhd v. Pengarah Jabatan Kerja Raya Negeri Sembilan* [2008] 4 MLJ 157 (*refd*)
- Pentadbir Tanah Daerah Petaling v. Swee Lin Sdn Bhd* [1999] 3 CLJ 577 (*refd*) G
- Tanjung Tiara Sdn Bhd v Paragro Sdn Bhd* [2010] 9 CLJ 400 CA (*refd*)

Legislation referred to:

- Evidence Act 1950, s. 65(1)(c) H
- Contracts Act 1950, ss. 74, 76
- [Appeal from High Court, Kuala Lumpur; Civil Suit No: D4-22A-48-2003]
- For the appellant - Dato' Harpal Singh Grewal (Jasvinjit Singh with him); M/s A/ Ariffin, Yeo & Harpal I
- For the respondent - Hj Sulaiman Abdullah (Kapt (B) Tajuddin Md Isa, R Thayakugan & Farah Naz Kumar with him); M/s Md Tajuddin & Co
- Reported by Amutha Suppayah

A

JUDGMENT**Hishamudin Mohd Yunus JCA:**

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[1] This is an appeal against the decision of the High Court of Kuala Lumpur of 1 June 2010. Before the High Court, the appellant was the plaintiff, and the respondent, the defendant.

[2] There is also a cross-appeal by the respondent on its counter-claim, but only in respect of quantum.

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[3] The claim of the appellant/plaintiff against the respondent/defendant before the High Court is for breach of Islamic financing agreements called *Al-Istisnaa*' agreements, namely, the *Al-Istisnaa*' Purchase Agreement ('the APA') and the *Al-Istisnaa*' Sale Agreement ('the ASA'). The appellant/plaintiff sought before the High Court several declarations, an injunction and general damages.

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[4] The respondent/defendant, on its part, denies that it was in breach of the *Al-Istisnaa*' agreements and made a counter-claim against the appellant/plaintiff for the full payment of the sale price under the ASA, minus the following sums: (1) the sum under the APA that was not released to the appellant/plaintiff; and (2) the sum that had been paid by the appellant/plaintiff (see para. 46 of the statement of defence and counter-claim). The net sum claimed under the counter-claim is RM143,590,488.09 (this is the figure as stated in para. 48(a) of the statement of defence and counter-claim).

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[5] At the conclusion of the trial, the learned trial judge allowed the appellant's/plaintiff's claim – but only partially. First, the learned High Court Judge granted the appellant's/plaintiff's prayer for a declaration that the termination by the appellant/plaintiff of the *Al-Istisnaa*' facility agreements, that is, the APA and the ASA dated 14 May 2001 is lawful and valid. That part of the order of the High Court granting the declaration reads:

- (1) tuntutan oleh Plaintiff untuk satu deklarasi bahawa penamatan Perjanjian-Perjanjian Kemudahan *Al-Istisnaa*' bertarikh 14.5.2001 oleh Plaintiff adalah sah dan mengikut undang-undang, diberikan.

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Secondly, the High Court awarded the appellant/plaintiff nominal general damages in the sum of RM50,000.

[6] The High Court, however, dismissed the appellant's/plaintiff's prayer for a declaration that by reason of the lawful and valid termination of the APA and the ASA the respondent/defendant is, as a consequence, not entitled to rely or enforce the securities given by the appellant/plaintiff for the facility agreements (the various security documents eg, deeds of assignment, guarantee agreements, debenture, undertaking, are listed in para. 33(2) of the statement of claim).

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[7] The learned High Court Judge also dismissed the appellant's/plaintiff's other consequential claims or reliefs (including a prayer for an injunction to restrain the respondent/defendant from enforcing the securities).

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[8] The learned High Court Judge, however, allowed the respondent's/defendant's counter-claim that it be paid in full the sale price under the ASA (minus the undisbursed sum under the APA and the sum paid by the appellant/plaintiff), but subject to certain deductions.

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The Appellant's/Plaintiff's Appeal

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[9] The appellant's/plaintiff's appeal is against:

- (a) the award of nominal general damages of RM50,000;
- (b) the refusal of the High Court to grant consequential reliefs in the form of declarations in respect of the securities;
- (c) the refusal of the High Court to grant a consequential relief in the form of an injunction in respect of the securities; and
- (d) the allowing of the respondent's/defendant's counter-claim against the appellant/plaintiff for full payment of the sale price under the ASA (but with certain deductions).

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The Respondent's/Defendant's Cross-appeal

[10] There is, as said earlier, a cross-appeal by the respondent/defendant against the decision of the learned High Court Judge in respect of the respondent's/defendant's counter-claim – but only on quantum. In its counter-claim before the High Court, the respondent/defendant claims that it be paid in full the selling price of RM185,360,000 as provided for under the ASA but minus the sums as stated in para. 46 of its statement of defence and

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- A counter-claim ie, the sum under the APA that was not disbursed to the appellant/plaintiff as well as the sum that has been paid to the respondent/defendant; thus arriving at the figure of RM143,590,488.09. The learned High Court Judge allowed the respondent's/defendant's counter-claim for this sum of
- B RM143,590,488.09. However, at the same time the learned judge deducted from this amount the following sums:
- (a) profits on the undisbursed sum of RM38,284,064.46 (this is the sum as stated in the sealed order, but in the learned High Court Judge's grounds of judgment, the sum is stated as
- C RM30,414,061.05); and
- (b) 'the profits (if any) that are unearned at the date of full payment)' (to quote the wordings in the sealed order).
- D [11] It is important to note, firstly, that the 'profits' in (a) and (b) above are not quantified by the sealed order; secondly, there is no order that the 'profits' in (a) and (b) be assessed by the court; and, thirdly, the learned judge in her grounds of judgment does not explain as to how the 'profits' in (a) and (b) above are
- E to be calculated.
- [12] The only complaint of the respondent/defendant in its cross-appeal is that the deductions should not have been made by the learned High Court Judge for 'profits' (a) and (b) above (but do
- F note that in the notice of cross-appeal filed by the respondent/defendant the undisbursed sum is stated to be 'RM38,284,075.16'). It is only against these deductions ('profits' (a) and (b)) that the respondent/defendant is cross-appealing.
- G **No Cross-appeal On Declaration On The Lawfulness And Validity Of Appellant's/Plaintiff's Termination Of The APA And The ASA**
- [13] It is important to note that the respondent/defendant is not cross-appealing against the declaration sought by the appellant/
- H plaintiff, and granted by the High Court, to the effect that the appellant's/plaintiff's termination of the two *Al-Istisnaa*' agreements (ie, the APA and the ASA) was lawful and valid. By not cross-appealing against the declaration pertaining to the lawfulness and validity of the termination of the two *Al-Istisnaa*' agreements (ie,
- I the APA and the ASA) by the appellant/plaintiff, the respondent/

defendant must be deemed to have accepted the lawfulness and the validity of the termination by the appellant/plaintiff of the APA and the ASA, and the correctness of the order of the High Court in granting the declaration. A

The Facts Of The Case B

[14] The appellant/plaintiff company intended to construct and develop a mill plant ('the project') in Kapar, Klang, to produce hot roll coils. The mill plant then was second of its kind in this country. The appellant/plaintiff expected to complete the construction of the mill plant within two years, and thereafter to commence operation. C

[15] For the purpose of the project, the appellant/plaintiff obtained the following financing: D

- (a) a sum of approximately RM309.62 million from its shareholders;
- (b) a sum of RM97 million from the respondent/defendant bank; and E
- (c) a sum of USD80 million from foreign EXIM banks.

[16] The financing provided by the respondent/defendant bank took the form of an Islamic financing facility known as *Al-Istisnaa'*.

[17] Under the *Al-Istisnaa'* financing facility, the respondent/defendant purchased the project from the appellant/plaintiff for a sum of RM97 million (hence the APA). F

[18] Concurrently, the respondent/defendant sold the project back to the appellant/plaintiff at an agreed price of RM185.36 million, payable by the appellant/plaintiff by way of 40 quarterly installments (hence the ASA). G

[19] For the purpose of the financing facility, the parties executed the following two agreements: H

- (a) The *Al-Istisnaa'* Purchase Agreement ('the APA'); and
- (b) The *Al-Istisnaa'* Sale Agreement ('the ASA').

[20] In addition, in order to secure the financing facility, the following documents were executed in favour of the respondent/defendant bank: I

- A (a) A deed of assignment executed by the appellant/plaintiff in favour of the respondent/defendant in respect of the land on which the project is located;
- B (b) A debenture executed by the appellant/plaintiff in favour of the respondent/defendant;
- (c) A deed of assignment of an insurance policy in respect of the project;
- C (d) A deed of assignment of performance bonds in respect of the project;
- (e) A memorandum of deposit of an investment account certificate over a sum of RM1 million in favour of the respondent/defendant;
- D (f) A corporate guarantee executed by a company, Tai E King Sdn. Bhd., in favour of the respondent/defendant;
- (g) A directors' guarantee by two directors of the appellant/plaintiff, namely, Dato' Tai E King and Tai Hean Leng in favour of the respondent/defendant;
- E (h) A shareholders' support agreement executed by Tai E King Sdn. Bhd.; and
- F (i) A shareholders' undertaking also executed by Tai E King Sdn. Bhd.

All the above documents are dated 14 May 2001.

- G [21] The purchase price under the APA was to be drawdown in three tranches. To trigger a drawdown, the appellant/plaintiff was required to give the respondent/defendant a notice of drawdown in accordance with the schedule to the APA.

- H [22] The first two tranches of RM46,116,596.07 (released on 27 April 2001) and RM12,099,338.77 (released on 29 May 2001) were duly drawdown (see para. 8 of the statement of agreed facts), leaving a third tranche of RM38,284,064.46 (this is the figure as stated in the sealed order of the High Court) yet to be disbursed.

- I [23] The respondent/defendant failed to comply with the terms of the facility by failing to release the third tranche, although it had been duly served with the requisite drawdown notice by the

appellant/plaintiff (it is not disputed that the appellant/plaintiff had submitted a drawdown notice in accordance with the schedule to the APA to the respondent/defendant), and despite several reminders by the latter. A

[24] The appellant/plaintiff contends that this failure by the respondent/defendant amounted to a repudiation of the respondent's/defendant's obligations under the financing facility; and by a letter of 26 April 2002 the appellant/plaintiff accepted this repudiation and terminated the facility. B

[25] By a letter dated 14 April 2003 the respondent/defendant responded to the appellant's/plaintiff's letter, alleging that it was the latter who had breached the APA by failing to satisfy a condition precedent prescribed by cl. 5.1(v) of the APA in that it failed to secure financing from a foreign EXIM bank in the sum of USD80 million. C D

The Appellant's/Plaintiff's Claim

[26] The appellant/plaintiff claims that, by reason of the failure on the part of the respondent/defendant to allow the drawdown of the third tranche, the respondent/defendant had breached both the APA and the ASA, and the appellant/plaintiff was entitled to rescind the APA and the ASA; and hence it seeks, among others, the following relief in prayer (1) of the statement of claim: E

(1) A declaration that the termination of the *Al-Istisnaa'* Facility Agreements dated 14-5-2001 was valid and lawful. F

[27] It is also the appellant's/plaintiff's case that by reason of the breach of the APA and the ASA by the respondent/defendant it had suffered heavy losses and is therefore claiming damages. G

[28] The respondent/defendant in its defence contends that it was the appellant/plaintiff who had breached the *Al-Istisnaa'* agreements by failing to meet the condition precedent referred to earlier. H

Contradiction In The Trial Judge's Grounds Of Judgment

[29] At the outset, it must be pointed out that the learned trial judge, having made an order granting a declaration to the effect that the appellant's/plaintiff's termination of both the *Al-Istisnaa'* agreements (ie, the APA and the ASA) is lawful and valid, yet in her grounds of judgment appears to have treated only the APA as I

- A having been lawfully terminated; in spite of the fact that it is the appellant's/plaintiff's contention that the conduct of the respondent/defendant amounts to an unlawful repudiation and breach of both the APA and the ASA as they are inseparable and are to be treated as one facility agreement. To my mind, and with
B respect, this approach amounts to self-contradiction on the part of the learned trial judge in her grounds of judgment. She said in her grounds (at para. 27):

Therefore I hold that the Plaintiff had rightly terminated the APA by its letter of 26.4.2002.

- C
[30] Even in that part of her grounds of judgment pertaining to the respondent's/defendant's counter-claim (see para. 46 of the grounds of judgment) the learned trial judge does not discuss on the clear and unambiguous ruling and declaratory order that she
D had made pertaining to the lawfulness and validity of the appellant's/plaintiff's termination of both the APA and ASA. But the fact remains that the sealed order of the High Court does clearly state that the High Court declares that the appellant's/
E plaintiff's termination of both the APA and the ASA was lawful and valid. With respect, the learned trial judge, in her grounds of judgment, appears to be oblivious to this fact, that is, the declaration that she had made in clear terms.

- [31] In my judgment, I accept Dato' Harpal's (learned counsel for the appellant/plaintiff) submission that I should disregard this contradiction in the grounds of judgment of the learned High Court Judge as any order this court (ie, Court of Appeal) makes must strictly relate to the ruling in the sealed order of the High Court and not on the inconsistent or contradictory position taken
F by the learned trial judge in her grounds of judgment.
G

- [32] It is of importance to note – as what I have stressed earlier in this judgment – that the respondent/defendant has accepted the High Court Order declaring the appellant's/plaintiff's termination of the APA and the ASA to be lawful and valid and has not filed a cross-appeal against this part of the order.
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The Appellant's/Plaintiff's Appeal Against The Trial Judge's Refusal To Grant The Declaration And Injunction In Respect Of The Security Documents

- I
[33] In my judgment, the learned trial judge made a correct finding when she ruled that the respondent/defendant had

breached the APA; and had correctly granted the declaration sought by the appellant/plaintiff that the termination of the APA and the ASA was lawful and valid. A

[34] However, having made such a finding and declaration, the learned trial judge refused to declare that the respondent/defendant was not entitled to rely on or enforce the securities and that all the securities be discharged forthwith. She also refused to grant an injunction to restrain the respondent/defendant from enforcing the securities. B

[35] It is the submission of the appellant/plaintiff that the learned trial judge had erred: she should have granted the above consequential reliefs as prayed for by the appellant/plaintiff. C

[36] With respect, I agree with the submission that the learned trial judge had erred by refusing to grant the consequential reliefs prayed for by the appellant/plaintiff. D

[37] It is not disputed that the security documents were executed contemporaneously with the APA and the ASA. Indeed, all these documents were dated the same date. E

[38] Furthermore, the recitals to and terms of the security documents all point to the fact that they are all closely related to one another and form part of the very same documents governing the rights and obligations between the parties pertaining to a single financial facility. F

[39] Hence the APA cannot be segregated from the ASA; and the security documents cannot be segregated from the APA and the ASA. As such the APA and the ASA must be treated as one facility agreement, such that a repudiation (and breach) of the APA by the respondent/defendant (which is the case here) would automatically result in a repudiation (and breach) of the ASA as well; and the security documents must be treated as one with the APA and the ASA. In *Glamour Green Sdn Bhd v. Ambank Bhd & Ors & Another Appeal* [2007] 3 CLJ 413, Gopal Sri Ram JCA (as he then was) said: G H

[7] It is a settled guiding principle that where in a transaction more than one document or instrument is involved, courts usually construe those documents together. The point was made by *Raja Azlan J in Mohamed Isa & Ors v. Abdul Karim & Ors* [1970] 2 MLJ 165 in a language that cannot be rivaled. This is what Raja Azlan J (as His Royal Highness then was) said: I

- A It is a settled rule of construction that where several documents forming part of one transaction are executed contemporaneously, all the documents must be read together as if they were one. This principle was followed in *Idris bin Haji Mohamed Amin v. Ng Ah Siew* [1935] MLJ Vol. IV 257 ...
- B [40] In *Manks v. Whiteley* [1912] 1 Ch 735, Fletcher Mouton LJ said (at p. 754-755):
- C But I say it to emphasize the principle that where several deeds form part of one transaction and are contemporaneously executed they have the same effect for all purposes such as are relevant to this case as if they were one deed. Each is executed on the faith of all the others being executed also and is intended to speak only as part of the one transaction and if one is seeking to make equities apply to the parties they must be equities arising out of the transaction as a whole. It is not open to third parties to treat each one of them as a deed representing a separate and independent transaction for the purposes of claiming rights which would only accrue to them if the transaction represented by the selected deed was operative separately. In other words, the principles of equity deal with the substance of things, which in
- E such a case is the whole transaction, and not with unrealities such as the hypothetical operation of one of the deeds by itself without the others.
- F [41] Applying the above principles, the learned trial judge ought not to have refused the reliefs on the security documents as prayed for by the appellant/plaintiff. This refusal on her part is inconsistent with her order declaring the appellant's/plaintiff's termination of the APA and the ASA to be lawful and valid.
- G [42] In her grounds of judgment the learned High Court Judge takes the position that that the security documents were necessary to secure payments due on the counter-claim (which she had granted) and hence they ought not to be disturbed.
- H [43] In my judgment, such reasoning is untenable in the light of the fact that the learned High Court Judge had already made an order declaring the termination of the APA and the ASA by the appellant/plaintiff to be lawful and valid. Once the termination of the APA and the ASA is declared lawful and valid, the respondent/defendant ceased to have any rights under the APA and the ASA, and the security documents lose their purpose and
- I should cease to have any legal effect. In other words they should no longer be enforceable by the respondent/defendant.

[44] In my judgment, for the purpose of the issue at hand, the case of *Bank Islam Malaysia Bhd v. Lim Kok Hoe & Anor & Other Appeals* [2009] 6 CLJ 22 is irrelevant as the issue in that case is different from the issue in the present case. There, in that case, the sole issue before the Court of Appeal was whether the Bai Bithaman Ajil contract (the BBA contract) was contrary to the religion of Islam. The present case, however, concerns *Al-Istisnaa'* agreements, and there is no assertion by any party that the *Al-Istisnaa'* agreements are contrary to the religion of Islam. The remark made by the Court of Appeal at para. 20 of its judgment, on the status of the security document (such as a charge or a deed of assignment) *vis-a-vis* the BBA contract, at best, is merely an *obiter dicta*, and is not meant to be a statement of a legal principle.

[45] Therefore, the reliefs on the security documents, as prayed for by the appellant/plaintiff, should have been granted.

[46] Accordingly, I am allowing the appellant's/plaintiff's appeal against that part of the decision of the learned High Court Judge that disallowed the appellant's/plaintiff's prayer seeking reliefs in respect of the security documents.

The Appellant's/Plaintiff's Appeal Against The Award Of Nominal General Damages Of RM50,000

[47] The appellant/plaintiff is appealing against the award of nominal general damages in its favour amounting to RM50,000. Although this award is in favour of the appellant/plaintiff, nevertheless, the appellant/plaintiff is aggrieved by this award on the ground that this sum is manifestly inadequate. It is the contention of the appellant/plaintiff that the award of damages should not have been nominal; it ought to have been substantial.

[48] In the statement of claim, although there is a prayer for general damages (see para. 33(10)), there is, however, no prayer that the damages be assessed at a later stage by a separate inquiry (be it by the trial judge or by a registrar); nor did the appellant/plaintiff ask either at the trial or in submission before the High Court that the general damages be assessed at a later stage.

[49] Needless to say that the burden of proof on the issue of quantum lies on the appellant/plaintiff.

- A [50] In my judgment, the learned trial judge was correct in
awarding only nominal general damages of RM50,000 (which,
I think, is a generous sum, considering that it is meant to be only
nominal). This is because having examined the evidence it is clear
to me that the appellant/plaintiff had failed to furnish clear
B evidence as to the amount of damages that it suffered. It is true
that the learned trial judge, in her grounds of judgment, after
having quoted what Thomson CJ (as he then was) in *Lee Sau
Kong v. Leow Cheng Chiang* [1960] 1 LNS 56; [1961] 27 MLJ at
p. 20, said:
- C Guided by the same case, though I know that the Plaintiff would
suffer damages resulting from the Defendant's breach, the
assessment of damages is virtually impossible.
- D [51] But to my mind this is an indirect way of saying that she
found that the appellant/plaintiff had failed to prove the damages
it claimed to have suffered.
- E [52] However, at this appellate stage the appellant/plaintiff is now
urging this court to allow the appeal on general damages, and that
the issue of quantum be remitted to the High Court for the
general damages to be assessed.
- F [53] With respect, in my judgment, it is now rather too late in
the day to make a request that the matter be send back to the
High Court for the quantum of damages to be assessed.
- G [54] In my view the general rule has always been that the issue
of liability and quantum of damages should be determined together
once and for all at the trial. The determination of a claim should
never be on a staggered or on an installment basis: determine the
issue of liability first, and then to have another trial or inquiry to
determine the quantum of damages. If the appellant/plaintiff had
wanted the issue of quantum of damages to be determined at later
stage of the trial, after the issue on liability had been determined
first, then, this mode of trial must be pleaded in the statement of
H claim (which is not the case here), and the appellant/plaintiff must
furnish good reason as to why there should be a separate exercise
to determine the quantum of damages. And I must add here that
a trial court should never easily accede to a request, even if made
mutually by the parties (it is not the case in the present case),
I that the issue of liability and quantum of damages be determined

on a staggered/installment basis, except in exceptional circumstances and good reason is given, and the trial judge is notified well in advance prior to the trial of the mutual desire of parties that the issue of quantum should only be determined after the issue of liability had been determined.

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[55] With respect, I do not think that *Abdul Rahim Abdul Hamid & Ors v. Perdana Merchant Bankers Bhd & Ors* [2006] 3 CLJ 1, cited by the learned counsel for the appellant/plaintiff establishes any principle of law as to the circumstances as to when an Appellate Court should order an assessment of damages. In the first place it is not clear from the judgment of the Federal Court as reported as to whether or not there is a prayer in the statement of claim for damages to be assessed at a later stage after liability had been determined. For all we know, there could have been such a prayer. But in our case it is clear that there is no such prayer.

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[56] Accordingly, I am dismissing this part of the appellant's/plaintiff's appeal.

The Appellant's/Plaintiff's Appeal Against The Award Of Damages In Favour Of The Respondent/Defendant In Respect Of Its Counter-claim

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[57] In my judgment, once the learned trial judge had made an order that the appellant/plaintiff had lawfully and validly terminated the APA as well as the ASA, she must be deemed to have accepted the submission of the appellant/plaintiff that the respondent/defendant bank had unlawfully repudiated both the APA and the ASA (and not just the APA). In my judgment, regardless of the inconsistent position taken by the learned trial judge in her grounds of judgment, on the facts, she is correct in law in making a finding, as reflected in the sealed order of the High Court, that the appellant's/plaintiff's termination of both the *Al-Istisnaa'* agreements, namely, the APA and the ASA, was lawful and valid. Legally, for the reason that I have explained earlier, it would not be logical for the court to hold that although the APA is lawfully and validly terminated yet the ASA is still valid and subsisting. And having made a declaratory order on the lawfulness and validity of the termination by the appellant/plaintiff of both the APA and the ASA, it would be contradictory or inconsistent on the part of the learned trial judge to allow the respondent's/defendant's counter-claim. It is a basic principle of law that a party

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- A cannot benefit from its own wrongdoing (*Pentadbir Tanah Daerah Petaling v. Swee Lin Sdn Bhd* [1999] 3 CLJ 577). Furthermore it is settled principle that once a contract is lawfully terminated the contract comes to an end and parties are absolved from all future obligations (see *Abdul Razak Datuk Abu Samah v. Shah Alam Properties Sdn Bhd & Another Appeal* [1999] 3 CLJ 231; [1999] 2 MLJ 500 at p. 506).

- [58] In allowing the respondent's/defendant's counter-claim, the learned trial judge relied on *Bank Bumiputra Malaysia Bhd Kuala Terengganu v. Mae Perakayan Sdn Bhd & Anor* [1993] 2 CLJ 495. With respect, on the facts of that case I do not think that that case is relevant to the present case. The ruling in that case is based on the peculiar facts of that case. Moreover, the present case concerns an Islamic banking facility where the APA and the ASA are inter-dependant with one another. The appellant/plaintiff would not have entered into the ASA with the respondent/defendant if not because of the respondent/defendant agreeing to execute the APA; and, conversely, the respondent/defendant bank would not have entered into the APA with the appellant/plaintiff if not because of the appellant/plaintiff agreeing to execute the ASA. In other words, the transaction is not a conventional lending transaction by an ordinary commercial bank.

- [59] It is significant to observe from the grounds of judgment of the learned trial judge the following. First, although the learned trial judge allowed the counter-claim yet, with respect, she does not say whether the parties' rights and obligations under the ASA are still subsisting as a separate agreement. She appears to have simply glossed over the issue as to the legal status of the ASA, after having found that the respondent/defendant had unlawfully repudiated the APA. Secondly, the reason given by the learned trial judge in her grounds of judgment for allowing the counter-claim is merely that the appellant/plaintiff had benefitted from the two drawdowns. In the words of the learned trial judge:

- H It is quite clear in the present case that the Plaintiff benefitted from the agreement from the amount drawn down as earlier discussed. The Plaintiff admitted that the amount paid pursuant to the drawdown on the facility was made for and on its behalf, and should be liable to pay back.

- I [60] In my judgment it is irrelevant that the appellant/plaintiff had 'benefitted' from the two drawdowns under the APA because the respondent's/defendant's claim under the counter-claim is not for

the restoration of the sums released under the APA. It is not a claim for restitution. It is a claim in contract for breach of the ASA. It is a claim for full payment of the sale price of RM185,360,000 under the ASA – minus the sum under the third tranche of the APA that was not released to the appellant/plaintiff and any sum that had been paid by the appellant/plaintiff.

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[61] Thirdly, with respect, the learned trial judge's understanding as to the basis of the respondent's/defendant's counter-claim appears to be inconsistent, if not confusing. At para. 43 of her grounds of judgment, her understanding of the respondent's/defendant's counter-claim is that the counter-claim is based on the APA. She said in her grounds:

C

The counterclaim by Defendant

43. The Defendant is counterclaiming from the Plaintiff for the outstanding balance due and payable under the APA based on the amount disbursed.

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[62] However, at a later part of her grounds of judgment, at para. 46, the learned trial judge has a different understanding of the respondent's/defendant's counter-claim. She now says the respondent/defendant is counterclaiming based on the ASA. She said:

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Quantum of the Counterclaim

46. The Defendant raised issue on the computation of the quantum of the Defendant's counterclaim for failure of the Defendant to take into account unearned profit of the amount not drawn down. The counter claim of the Defendant is based on the sum under the ASA.

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[63] There is also the further submission – which I accept – that that part of the order referring to 'the profits (if any) that are unearned at the date of full payment' is vague and unenforceable and ought to be set aside.

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[64] Accordingly, I am allowing the appellant's/plaintiff's appeal against the High Court's order pertaining to the respondent's/defendant's counter-claim.

[65] However, this is not the end of the matter as far as the appellant's/plaintiff's appeal on the counter-claim goes. For, I do not [*sic*] that in the appellant's/plaintiff's written submission at para. 75 it is submitted in the alternative by the appellant/plaintiff

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- A that it is prepared to refund the sums disbursed by the respondent/defendant to it (I presume subjecting to deducting any payments that it had made to the respondent/defendant). Therefore, in allowing the appellant's/plaintiff's appeal on the counter-claim I am making an order that the appellant/plaintiff do
- B return to the respondent/defendant the sum of RM58,715,934.84 that had been disbursed to it minus any repayments that it had made to the respondent/defendant.

C **The Respondent's/Defendant's Cross-Appeal On Quantum Under Its Counter-Claim**

- D [66] In the light of my decision above in allowing the appellant's/plaintiff's appeal in respect of the learned trial judge's decision on the respondent's/defendant's counter-claim, I am therefore dismissing the respondent's/defendant's cross-appeal on the quantum in respect of its counter-claim.

[67] I am ordering that each party is to bear its own costs.

- E *[Appellant's appeal allowed in part; respondent's cross-appeal dismissed; each party to bear own costs]*

Aziah Ali JCA:

- F [68] This is the majority judgment of the court. My learned brother, A Samah Nordin, JCA has seen this judgment in draft, given his input and expressed his agreement with it.

- G [69] There are two appeals before us, namely, the appellant's appeal and the respondent's cross appeal against the decision of the learned judge in an action brought by the appellant against the respondent. The appellant's primary claim is for a declaration that its termination of the *Al-Istisnaa'* Facility Agreement dated 14 May 2001 is valid and lawful. By reason of the said lawful termination, the appellant seeks a further declaration that the respondent is not entitled to rely on or enforce, the following security documents:

- H (a) the Deed of Assignment;
- (b) the Debenture;
- (c) the Corporate Guarantee;
- I (d) the Directors' Guarantee;

- (e) the Memorandum of Deposit of Investment Account Certificate executed by the plaintiff in favour of the defendant for a sum of over RM1,000,000; A
- (f) the Deed of Assignment on insurance taken out in respect of the said Project; B
- (g) the Deed of Assignment of Performance Bonds taken out in respect of the said Project;
- (h) the Shareholder of Support Agreement; C
- (j) the Shareholder's Undertaking.

All the abovesaid security documents were dated 14 May 2001.

[70] The appellant also seeks several other reliefs, including:

- (a) an injunction restraining the respondent, by itself, its agents, servants or howsoever otherwise from acting on, placing reliance or enforcing the said Security Documents; D
- (b) special damages of RM78,247,014.53; E
- (c) general damages, interest and costs.

[71] The respondent's counterclaim is for the balance of the sale price in the sum of RM143,590,488.09 and costs.

[72] After a full trial, the learned judge granted the declaration that the appellant's termination of the *Al-Istinaa*' Agreements were valid and lawful. As for general damages the learned judge only allowed nominal damages of RM50,000 on the grounds that the appellant had failed to prove the damages and losses. The learned judge dismissed the rest of the appellant's claims. F G

[73] As for the counterclaim, the learned judge allowed the respondent's counterclaim for the balance of the sale price in the sum of RM143,590,488.09 less the profits on the undisbursed amount of RM38,248,064.46 and less the profits (if any) that are unearned at the date of full payment. H

[74] The appellant's appeal before us is against the quantum of general damages, the dismissal of the rest of its claims and against the award of counterclaim granted in favour of the respondent. I

- A [75] The respondent's cross appeal is only against the order of the learned judge allowing a sum of RM38,248,064.46 and the unearned profits (if any) at the date of full payment to be deducted from the balance of sale price of RM143,590,488.09.

B **Background**

- C [76] The appellant and the respondent entered into an Islamic financing arrangement by way of two *Al-Istisnaa'* Agreements, namely the facility agreement, known as the *Al-Istisnaa'* Purchase Agreement ("the APA") and the *Al-Istisnaa'* Sale Agreement ("the ASA") both dated 15 April 2001. Under the APA, the respondent, at the request of the appellant, agreed to provide a banking facility in the sum of RM97million for the purpose of part-financing the appellant's project to develop and construct a Steckel Hot Strip Mill Plant to produce Hot Rolled Coils ("the project") and to
- D redeem the land on which the plant was to be constructed. The land was, at the material time, assigned to Public Merchants Bankers Berhad as security for earlier credit facilities.

- E [77] In accordance with the *Al-Istisnaa'* principle, the appellant firstly entered into the APA whereby it agreed to sell the project to the respondent and the respondent agreed to purchase the project from the appellant and immediately thereafter the respondent entered into the ASA to sell back the project to the appellant on deferred payment terms.

- F [78] The APA provides that the beneficial interest in the project shall pass from the appellant to the respondent upon the execution of the APA. The ASA provides that further to the APA, the respondent agrees to sell and the appellant agrees to purchase
- G from the respondent the project at the price of RM185,360,000 ("the sale price") comprising the purchase price together with an agreed profit margin upon terms and conditions contained in the ASA. Similar to the APA, the ASA provides that the beneficial interest in the project shall pass from the respondent to the
- H appellant upon the execution of the ASA.

- I [79] The RM97million was to be disbursed through the Financing Payable Account ("the FPA") maintained by the respondent and was to be drawdown in three tranches upon the appellant meeting all the conditions contained in the APA. As security for the *Al-Istisnaa'* facility the parties executed the abovesaid security documents.

[80] The respondent fully disbursed the RM97million into the FPA. It is not in dispute that out of the RM97million facility, the respondent had allowed the first drawdown of RM46,116,596.07 (“the first tranche”) and a second drawdown of RM12,599,338.77 (“the second tranche”) totalling RM58,715,984.84.

A

The Appellant’s Claim

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[81] The appellant alleges that the respondent had wrongly refused and/or withheld drawdown of the third and final tranche amounting to RM38,784,015.16. Hence the appellant claims that by its refusal in releasing the third tranche, the respondent has committed a fundamental breach of the APA which amounted to a repudiation of the respondent’s obligations under the said agreement. The appellant states it had no alternative but to accept the respondent’s repudiation of the APA and by letter dated 14 May 2001 terminated the APA (p. 1027 Appeal Record vol. 6).

C

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[82] The appellant contends that as a result of the respondent’s repudiation of the APA, the appellant is discharged from its obligations and is no longer bound by the APA and the ASA and that the security documents are discharged and/or cancelled. Thus the appellant contends that it is not indebted to the respondent for repayment of the sums that had not been drawdown at all. According to the appellant, despite the respondent’s repudiation of the ASA, the latter demanded repayment and threatened to enforce the security documents. It is the appellant’s case that the respondent is not entitled to rely or/and enforce the security documents by reason of the termination of the Facility Agreement due to the fundamental breach of the APA committed by the respondent.

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[83] The appellant commenced action against the respondent in the court below seeking *inter alia* the following reliefs:

- (1) a declaration that the termination of the *Al-Istisnaa*’ Facility Agreements dated 14 May 2001 by the appellant was valid and lawful;
- (2) a declaration that by reason of the lawful termination of the *Al-Istisnaa*’ Facility Agreements by the appellant, the respondent is not entitled to rely on or enforce as against the appellant the security documents;

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- A (3) an injunction restraining the respondent by itself, its agents, servants or howsoever otherwise from acting on, placing reliance or enforcing in whatsoever manner the security documents as against the appellants;
- B (4) a declaration that all the security documents shall forthwith be discharged and be of no effect;
- (5) the sum of RM78,247,014.53 representing the loss and damage suffered by the appellant;
- C (6) an order that the respondent account for all profits earned under the *Al-Istisnaa*' Facility Agreements;
- (7) an order that the respondent repay the appellant all such profits earned and paid to the respondent under the *Al-Istisnaa*' Facility Agreements upon taking such account;
- D (8) general damages, interests and costs.

The alternative claim for loss of profit in the sum of RM101,776,000 had been withdrawn.

- E [84] The sum of RM78,247,014.53 that the appellant claims as loss and damage suffered by the appellant comprise the following items:

F	Payments made for the redemption of the said Land under the previous facilities provided by Sime Merchant Bank Berhad towards initial Project cost	RM46,116,596.07
G	Payments made to suppliers and other local contractors	RM12,599,388.77
H	Payments due and owing to turnkey contractor as a debt (USD5,000,000.00 for cost of services rendered and USD300,000.00 for late payment at the exchange rate of RM3.526 per USD1.00)	RM18,687,800.00
I	Cumulative total	RM78,247,014.53 [sic]

The Respondent's Counterclaim

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[85] The respondent on the other hand contends that it was justified in refusing further drawdown of the facilities as the appellant has failed to satisfy a condition precedent under cl. 5.1(v) of the APA which is to submit evidence satisfactory to the respondent that the appellant has secured facilities totalling approximately USD80million from foreign EXIM banks. By way of a counterclaim the respondent claims against the appellant the whole of the sale price under the ASA amounting to RM185,360,000 less the amount that has not been drawdown and payments that had been made by the appellant. Therefore the respondent claims against the appellant the sum of RM143,590,488.09, costs and such other reliefs this court deems just and appropriate.

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Findings By The Trial Judge

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[86] The trial judge found that the refusal or withholding by the respondent of the drawdown of the third tranche amounted to a breach of the APA and the learned judge held that the appellant had rightly terminated the APA (see para. 27 of the judgment). The respondent has not appealed against this decision.

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[87] On the issue of damages, the learned judge found that the appellant has failed to prove its claim for damages. Her Ladyship found that it was virtually impossible to assess damages. Notwithstanding this finding the learned judge acknowledged that the appellant would suffer damage resulting from the respondent's breach. In the circumstances the trial judge allowed the declaratory order in terms of prayer (1) above but awarded a token sum of RM50,000 as damages with costs. The trial judge dismissed the appellant's prayers for various injunctive reliefs and discharge of the ASA and security documents.

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[88] In respect of the appellant's claim for specific damages, the trial judge found that the RM46,116,596.07 which was the first tranche was used by the appellant to redeem the said land. Hence the appellant suffered no loss but on the contrary has benefited from the appreciation in the value of the said land. This claim was therefore dismissed. In respect of the appellant's claim for RM12,599,388.77 which was the second tranche drawdown, the trial judge found that there were discrepancies in the appellant's

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- A documents and evidence and Her Ladyship found that PW2, the appellant's witness, confirmed that the certification of claims by the appellant's consultant was not tendered in court. Upon consideration of the appellant's evidence the trial judge found that the appellant has failed to satisfactorily account for the non
- B production of primary documents and no evidence was led to show that reasonable effort had been taken by the appellant to come under the exception to s. 65(1)(c) of the Evidence Act 1950 to tender secondary evidence (*KPM Khidmat Sdn Bhd v. Tey Kim Suie* [1994] 3 CLJ 1; *Kesang Leasing Sdn Bhd v. Dato' Haji Mat @*
- C *Mat Shah bin Ahmad & Ors (No 2)* [2009] 1 LNS 74). Thus the trial judge found that this item, even if claimable, was not proven. In respect of the claim for RM18,687,800 (comprising of USD5,000,000 being costs due and owing to turnkey contractor for services rendered and USD300,000 for late payment charges)
- D the trial judge found the evidence of the appellant's witnesses wanting and highly inconsistent and did not appear to be credible. The trial judge found that the appellant has failed to prove this item of loss.
- E [89] In respect of the respondent's counter-claim for the balance outstanding under the ASA, the trial judge disagreed with submissions by counsel for the appellant that the respondent's counterclaim ought to be dismissed as the respondent ought not to be permitted to take advantage of its own breach (*Pentadbir Tanah Petaling v. Swee Lin Sdn Bhd* [1999] 3 MLJ 489). The
- F learned judge found that in the present case the principle in *Pentadbir Tanah Petaling* did not apply. The learned judge referred to *Bank Bumiputera Malaysia Bhd Kuala Terengganu v. Mae Perakayan Sdn Bhd* [1993] 2 CLJ 495 in which despite the bank's
- G breach of the loan agreement, the court allowed the bank's claim for the outstanding balance under the loan agreement. In its judgment the Supreme Court said *inter alia*:
- H The dismissal of the Bank's counterclaim in respect of the sum owing by the first respondent to the bank on the overdraft facility on the ground that the Bank was in breach of contract in recalling the overdraft prematurely cannot be justified. The Bank's claim for recovery of the loan was entirely a separate matter from the first respondent's claim for damages against the Bank.
- I Accordingly on the basis that the only defence relied on by the appellant was the respondent's breach, the learned judge allowed the respondent's counterclaim in the sum of RM143,590,488.09

less profits on the amount of RM38,248,064.46 not drawdown and less profits (if any) that are unearned at the date of full payment. Against this decision the respondent has cross appealed. A

The Appeal

[90] In considering this appeal we take note that the Facility Agreements under consideration are financial instruments in Islamic banking similar in essence to Bai Bithaman Ajil contract ("BBA contract"). In *Bank Islam Malaysia Bhd v. Lim Kok Hoe & Anor & Other Appeals* [2009] 6 CLJ 22, Raus Sharif JCA (as His Lordship then was) said as follows: B C

A BBA contract is a financial instrument in Islamic banking ... It is used to finance bank's customers to purchase and own properties or assets. It involves two distinct contracts, one a Property Purchase Agreement and also a Property Sale Agreement. D

... BBA contract is in fact a trade transaction. It is a transaction between the customer and the bank. In such a transaction, there is a purchase agreement and a separate sale agreement between the customer and the bank. E

On the question of what law applies His Lordship said:

... the law applicable to BBA contracts is no different from the law applicable to loan given under the conventional banking. The law is the law of contract and the same principle should be applied ... F

Damages

[91] Before us learned counsel for the appellant Dato' Harpal Singh Grewal submits that the learned judge erred in that, having found that the respondent was in breach, the learned judge ought to have made consequential orders including a date be set for an inquiry of damages before the High Court (*Abdul Rahim Abdul Hamid & Ors v. Perdana Merchant Bankers Bhd* [2006] 3 CLJ 1). Counsel submits that the respondent's breach led to delay and suspension of the project. It is submitted that the learned judge has misdirected herself in concluding that damages are difficult to assess as difficulty in assessing damages is not a ground for refusing to make an award for general damages (*Nirwana Construction Sdn Bhd v. Pengarah Jabatan Kerja Raya Negeri Sembilan* [2008] 4 MLJ 157). G H I

- A [92] Learned counsel for the respondent Hj Sulaiman Abdullah submits that s. 74 and 76 of the Contracts Act 1950 requires proof of damage. Counsel submits that the learned judge has not erred in her findings that consequent to the breach by the respondent the appellant's remedy is in damages, but having
- B considered the evidence Her Ladyship found insufficient proof. In the circumstances no order on damages could be made. Counsel further submits that in awarding nominal damages the learned judge has awarded more than what the appellant is entitled to.
- C [93] In respect of claims for damages, we agree with the learned judge that the burden is on the appellant to prove the damages claimed. We need only refer to the judgment of Ong Hock Thye FJ in the case of *Guan Soon Tin Mining Company v. Wong Fook Kum* [1968] 1 LNS 43 wherein His Lordship said *inter alia* as
- D follows:
- E The respondent, as plaintiff, of course had to discharge the burden of proving both the fact and the amount of damages before he could recover. Where he succeeded in proving neither fact nor amount of damage he must lose the action or, if a right was infringed, he would recover only nominal damages. Where he succeeded in proving the fact of damage, but not its amount, he would again be entitled to an award of nominal damages only. This statement of the law is concisely stated in Mayne & McGregor on Damages (12th edn.) para. 174. For its practical
- F application I would quote Lord Goddard CJ in *Bonham-Carter v. Hyde Park Hotel Ltd* [1948], 64 TLR 177 at 178:
- G Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars and so to speak, throw them at the head of the Court, saying, 'This is what I have lost: I ask you to give me these damages'. They have to prove it.
- H The case of Mae Perakayan cited by the learned judge is essentially a claim for damages for breach of contract to lend money. The developer's claim for loss of profit was allowed upon evidence given by the quantity surveyor of the project whose calculations showed that the respondent would make a profit of RM5.3million. However the claim for reimbursement of damages paid to third party was disallowed since there was no evidence
- I adduced from the third parties concerned. Therefore the trial

judge's award of RM1,774,834.50 was set aside as the court found that this claim had not been properly substantiated. Despite the breach committed by the bank, the court allowed the bank's claim for outstanding balance under the loan agreement.

[94] In the present case we find that the learned trial judge has considered s. 74 and 76 of the Contracts Act 1950. The learned judge has considered each item of loss and damage claimed by the appellant (see paras. 35 to 40 of the judgment) and the testimonies of the appellant's witnesses and documentary evidence. Having considered the evidence before her, Her Ladyship found no evidence to suggest that failure of the appellant's project could be contributed by the respondent's failure to allow drawdown of the third tranche. The learned judge found discrepancies in the appellant's documents, the certification of claims by the appellant's consultant was not tendered and the evidence of the appellant's witnesses wanting and highly inconsistent and did not appear to be credible. These findings were arrived at based on the learned judge's appreciation of the evidence and her assessment of the credibility and demeanor of the witnesses. A trial judge is a trier of facts and an award of damages made based on findings of facts from evidence adduced at the trial ought not to be disturbed unless it is shown that the findings are clearly wrong or erroneous or that the trial judge had not considered relevant matters or had taken into account irrelevant matters. In the case of *Tanjung Tiara Sdn Bhd v Paragro Sdn Bhd* [2010] 9 CLJ 400 (as cited by the respondent in its written submissions) Low Hop Bing JCA said *inter alia*:

The award of damages by the learned trial judge is primarily based on his finding of facts in the light of the evidence adduced at the trial. In the light of two conflicting versions, he has accepted the evidence adduced for the plaintiff company and rejected the defendant's evidence. As a trier of facts, the learned trial judge is entitled to do so.

We respectfully adopt a similar approach. We find that the appellant has not shown that the trial judge's findings on the issue of proof of damage are clearly wrong or erroneous or that the trial judge has erred in law and principle. We have perused and considered Her Ladyship's judgment and in her judgment the learned judge found that it was virtually impossible to assess damages. We are unable to agree with counsel for the appellant

- A that the learned judge found it difficult to assess damages. Read in its proper perspective it is our considered view that the learned judge found it impossible to assess damages in the context of the evidence adduced or lack thereof. We find that as the learned judge had found that there was insufficient evidence from the
- B appellant to prove damages, the learned judge has not erred in not making consequential orders for an inquiry of damages.

Security Documents

- C [95] Counsel for the appellant submits that the trial judge ought to have found that the security documents are part and parcel of the Facility Agreement and cannot be segregated from and must be treated as one (*Glamour Green Sdn Bhd v Ambank Bhd & Ors & Another Appeal* [2007] 3 CLJ 413; *Manks v. Whiteley* [1912] 1 Ch 735). Hence it is submitted that as a result of the termination
- D of the Facility Agreement by the appellant, the security documents are therefore of no effect and are discharged and/or cancelled. Therefore it is submitted that the trial judge ought to have extended her finding and granted the reliefs prayed for in respect
- E of the security documents. With respect we are unable to agree with counsel. In the House of Lords case of *Johnson & Anor v. Agnew* [1980] AC 367 (cited by the respondent in their written submissions) Lord Wilberforce referred to the judgment of Lord Porter in *Heyman v. Darwins Ltd* [1942] AC 356 as follows:
- F ... Strictly speaking, to say that on acceptance of the renunciation of a contract the contract is rescinded is incorrect. In such a case the injured party may accept the renunciation as a breach going to the root of the whole of the consideration. By that acceptance he is discharged from further performance and may bring an
- G action for damages, but the contract itself is not rescinded. (emphasis added)
- H [96] Insofar as Islamic financing transaction before us is concerned which is similar to BBA, the Property Purchase Agreement and the Property Sale Agreement complete the transaction. The sale takes place immediately pursuant to the execution of the Property Purchase Agreement and the Property Sale Agreement. However the security documents do not form part of the BBA transaction. His Lordship Raus Sharif succinctly explains in *Bank Islam Malaysia Bhd v. Lim Kok Hoe & Anor & Other Appeals* (*supra*) as follows:
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... in BBA contract, the Property Purchase Agreement and the Property Sale Agreement completed the BBA transaction. But, invariably the bank will require security from the customer for the payment of the bank's selling price. If a separate title to the property has been issued, the customer will create a charge in favour of the bank. If a separate title has not been issued, the customer will execute a deed of assignment by way of security. However, *it should be noted that the charge or assignment is not part of the BBA transaction. It is a security arrangement. Even without the charge or assignment the BBA contract will be completed.* (emphasis added)

The *Al-Istisnaa*' financing arrangement is similar to the BBA financing arrangement. There is a Property Purchase Agreement and a Property Sale Agreement. Following what has been said above, we find that the security documents herein are not part of the APA and the ASA. It is a separate security arrangement distinct from the facility agreement. Hence the learned judge has not erred in her finding that the security documents were for the purpose of securing the amount owed by the appellant to the respondent. Since the security documents are a security arrangement and not part of the financing transaction, we find that the termination of the APA would not result in the security documents being rendered discharged and/or cancelled as contended by counsel for the appellant. Therefore the learned judge has not erred in refusing to grant the prayers sought for in respect of the security documents.

[97] It is trite that the rights, interests and obligations of all parties to the agreement are spelt out in the various sections of the agreement and it is within the four corners of the agreement that such rights, interests and obligations have to be interpreted and determined. Clause 4.2 of the ASA provides as follows:

4.2 Continuing Security

The security hereby created is expressly intended to be and shall be a continuing security for all monies whatsoever now or hereafter from time to time owing by the Customer to the Bank until the whole of the Indebtedness shall have been paid to the Bank.

"Indebtedness" as defined under art. I of the ASA "means the sale price or any part thereof outstanding and all other monies whatsoever including but not limited to fees, costs (including legal

A costs on a solicitor client basis), charges and expenses due and payable to the bank under the security documents". "Sale price" is defined under art. 1 as "RM185,360,000".

B [98] The respondent's rights against the appellant are preserved by the terms of cl. 4.4(b) and (c) of the ASA which provide as follows:

4.4 Primary Security

C The security constituted under this Clause 4 shall be primary and not merely collateral security and the Bank's rights against the Customer shall not be discharged or impaired by:

D (b) non-fulfilment for any reason (known to the Bank or not) of any of the conditions, ... of any provision of any agreement with the Bank to which the Customer is a party ...

E (c) any other act, event or omission which would or might but for this Clause operate to impair or discharge the Customer's obligations to the Bank or the Bank's rights against the Customer

F We find no reason why the respondent ought to be restrained from acting upon the security documents. In *Inglis & Anor v. Commonwealth Trading Bank of Australia* [1971-1972] CLR 161 cited by the respondent, Walsh J said:

G ... it is not in dispute that there was an advance of money which were not repaid. Neither the existence of disputes as to the correct amount of that indebtedness nor the claim already mentioned that, whatever it was, it had been counterbalanced by the claim of the plaintiffs for damages is a ground, in my opinion, for preventing the mortgagee from exercising its rights under the mortgage instrument.

The Respondent's Cross Appeal

H [99] The learned judge found that the only defence raised by the appellant was the respondent's breach but this did not wholly absolve the appellant from liability to pay. We agree with the learned judge and adopt what the Supreme Court has held in *Mae Perakayan* that the borrower was liable to pay despite the breach by the bank which in fact caused a total failure of the project. It was held that the bank's claim for the recovery of the loan was

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an entirely separate matter from the borrower's claim against the bank. In the present case despite the failure of the respondent to allow drawdown of the third tranche, we find that this did not wholly absolve the appellant from liability to pay. The only issue is this: what is the correct amount that the respondent is entitled to counterclaim in view of its repudiation of the APA?

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[100] The appellant submits that the respondent should only be granted the actual amount disbursed amounting to RM58,715,934.84. The respondent on the other hand submits that the appellant is liable to pay RM143,590,488.09 being the balance of the sale price less the amount that has not been drawdown and payments that had been made by the appellant. The learned judge ordered that the amount payable on the counterclaim should be less the profits on the amount of RM38,248,064.46 not drawdown and less profits (if any) that are unearned at the date of full payment.

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[101] Profit in Islamic financing is different from interest. In *Bank Islam Malaysia Bhd v. Lim Kok Hoe & Anor & Other Appeals* (*supra*) Raus Sharif JCA said at p. 35:

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BBA contract is a sale agreement whereas a conventional loan agreement is a money lending transaction. The profit in BBA contract is different from interest arising in a conventional loan transaction ...

The respondent's profit on the sale is included in the sale price and both parties had agreed on the sale price. In *Dato' Hj Nik Mahmud Daud v. Bank Islam Malaysia Bhd* [1998] 3 CLJ 605 the Court of Appeal granted the order for sale for the full outstanding balance. But on the facts before us, we are unable to agree with the decision of the learned judge in allowing the counterclaim in the sum of RM143,590,488.09 less the profits on the undisbursed amount of RM38,248,064.46 and less the profit (if any) that are unearned at the date of full payment. As it was the respondent who repudiated the APA resulting in its termination, we are of the view that the respondent is only entitled to counterclaim and recover the sums which were paid to the appellant by way of the first drawdown (RM46,116,596.07) and the second drawdown (RM12,599,338.77) totaling RM58,715,934.84 and the corresponding profits thereon after deducting the amount of repayment (if any).

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- A [102] For the reasons adumbrated above, we dismiss the appellant's appeal in respect of the amount of nominal damages and the rest of its claims but we allow the appellant's appeal against the amount of counterclaim in the sum of RM143,590,488.09 and substitute it with an order that the
- B respondent is only entitled to a counterclaim in the sum of RM58,715,984.80 plus the corresponding profit thereon less the amount of repayment (if any). The appeal by the respondent on the counterclaim is dismissed. We order each party to bear its own costs. Deposit is refunded to the appellant.
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